EXHIBIT B

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration
Under AAA Commercial Arbitration Rules and Mediation Procedures
Amended and effective October 1, 2013

THRIVEST SPECIALTY FUNDING, LLC

Claimant

Represented by Peter Buckley of Fox Rothschild, LLP

v.

No: 01-18-0001-4765

WILLIAM E. WHITE

R-38 Emergency Measures of Protection Hearing

Respondent

Represented by Robert Wood of Wood Law Limited

DETERMINATION AND AWARD OF EMERGENCY ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration Agreement dated December 8, 2016 entered into by the above-named parties and the Claimant's Demand for Arbitration and Application for Emergency Interim Relief and Respondent's Answering Statement, having been considered and a Hearing having been held via telephonic conference call on May 15, 2019, at which evidence and the arguments of Counsel were heard and viewed, the Emergency Arbitrator makes the following findings.

I. STATEMENT AND HISTORY OF CASE

A. Prior History

1. *Filing*

On April 11, 2018, Claimant Thrivest Specialty Funding, LLC ("Thrivest") filed with the AAA a "Demand for Arbitration and Application for Emergency Relief" ("Claimant's Demand") for declaratory judgment and breach of contract, seeking *inter*

alia emergency interim relief directing Respondent William White ("White") to escrow $750,000[1] from his award into his attorney's trust account pending the Final Arbitrator's Award.

2. *Prior Scheduling Conference*

An R-38 Emergency Measures of Protection Scheduling Call was scheduled by this Arbitrator on April 26, 2018. Prior to the call on April 21, 2018, Claimant's Counsel, by email, requested from Respondent in advance of the Hearing, production of certain documents and information relating to Respondent's "distribution" as termed in Thrivest's Agreement as a member of the "Class" in the NFL Concussion Litigation in order to prepare and present its case for "Emergency Relief" at the Emergency Relief Arbitration Hearing. This Arbitrator did not order production of the requested Pre-Hearing Discovery at that time due to the limited subject matter of the scheduled Hearing, i.e., Scheduling, the lack of sufficient time and notice of the Request For Discovery and preliminary issues of whether AAA and this "Emergency Arbitrator" had subject matter jurisdiction.

3. *Judge Brody's Order*

Subsequently, on April 25, 2018, counsel for Respondent by email raised a number of issues pertaining to the jurisdiction of AAA over the dispute. In particular, Respondent cited the April 22, 2015 "Final Order and Judgment" of United States District Court Judge for the Eastern District of Pennsylvania, Anita Brody, which provided (in pertinent part) that Judge Brody's jurisdiction was "both continuing and

[1] This amount was later amended to $1,250,000 to include interest, attorney's and arbitration fees per Claimant's May 7, 2019, prehearing email communication.

exclusive over all matters pertaining to the Settlement Agreement[2] and its administration". Judge Brody's Order also determined that any assignments of proceeds of the Settlement Agreement were "void, invalid, and of no force and effect".[3]

4. *Arbitrator's Denial of Requested Discovery*

Claimant responded to Respondent by email on April 26, 2018, arguing that the Court has no jurisdiction over Thrivest and that once the settlement proceeds were distributed to White, the Court's jurisdiction over the settlement award would end.

During (and after) the April 26, 2018, Scheduling Call, this Arbitrator denied Claimant's requested items of discovery for the reasons stated *supra,* and a hearing on the Request For Emergency Measures of Protection was scheduled for May 4, 2018, before this Emergency Arbitrator.

5. *Further Court Action*

However, prior to that hearing, on May 2, 2018, after a telephonic hearing on Co-Lead Class Counsel's Emergency Motion for a Temporary Restraining Order enjoining the instant arbitration, Judge Brody granted the relief requested and enjoined the previously scheduled May 4, 2018, Emergency Arbitration Hearing until further hearing before the U.S. District Court on May 9, 2018, to determine whether a permanent

[2] "Settlement Agreement" refers to the NFL Concussion Settlement approved by the Court on April 22, 2015, effective January 7, 2017. The claims submission process opened for Class Members in March 2017.

[3] See also the Court's December 8, 2017 "Explanation and Order" (..."to the extent that any Class Member has entered into an agreement that assigned or attempted to assign any monetary claims, that agreement is void, invalid, and of no force and effect") and February 20, 2018 Order (directing Claims Administrator to pay awards directly to Class Members instead of their attorneys where Claims Administrator has notice of assigned transactions).

injunction would be appropriate[4]. A permanent injunction was issued on May 22, 2018, to which Thrivest timely appealed. In August 2018, Judge Brody dismissed Thrivest's lawsuit against White, citing her May 22, 2018, Order enjoining arbitration. Thrivest appealed.

Oral arguments on various appeals by third party cash advance companies to Judge Brody's Orders were heard by the 3rd Circuit Court of Appeals on January 23, 2019, among them Claimant Thrivest's appeal. Specifically, Thrivest challenged the Court's jurisdiction over Thrivest as well as Judge Brody's sweeping Order invalidating all third-party lender assignments and attempting to control what settlement recipients did with their settlement money *after* it had been dispersed to the NFL player members of the certified class.

6. *Partial Reversal of Judge Brody's Order by the 3rd Circuit*

On 4/26/19, in a reported opinion, the Court of Appeals for the Third Circuit partially reversed Judge Brody's Order, specifically holding that, "...despite having the authority to void prohibited assignments, the District Court went too far in voiding the cash advance agreements in their entirety and voiding contractual provisions that went only to a lender's right to receive funds after the player acquired them"[5].

The Court noted that Judge Brody's December 8, 2017, Order "went beyond pure issues of settlement administration to adjudicate the third-party contract rights of litigation funding companies"[6] when it voided all cash advance agreements in their entirety. Instead, the Appeals Court noted, that "the Court had the option ofinvalidating

[4] Counsel has provided a transcript of that hearing which has been reviewed.
[5] 3rd Circuit Order, p.7.
[6] 3rd Circuit Order, p.26.

only the assignment portions of the agreements containing true assignments and directing the Claims Administrator not to recognize any true assignments, without voiding the agreements in their entirety"[7].

The Appeals Court further stated that "...*once the funds are disbursed to the players, the District Court's power over the funds – and any contracts affecting the funds – is at an end*"[8] (emphasis provided). In holding that cash advance agreements remain enforceable – outside of the NFL claims administration context – to the extent the litigation companies retain rights under the agreements after any true assignments are voided[9], the Court concluded that:

> "...although the District Court had the authority to enforce the clear terms of the settlement agreement by ordering that any true assignments are void and unenforceable, the Court did not have the authority to void other obligations under the cash advance agreements, particularly without affording the lenders notice and a hearing, or making specific findings that those obligations violated the Court's prior orders or would impair the Court's administration of the settlement"[10].

Finally, the Appeals Court vacated Judge Brody's May 22, 2018, Order enjoining Thrivest from arbitrating its claims, and remanded for further proceedings. The Court noted that Thrivest and other "...litigation funding companies will be able to pursue, outside of the claims administration process, whatever rights they may continue to have under their cash advance agreements with class members", and that "...[a]ny questions going to the enforceability of the funding agreements will have to be litigated or

[7] 3rd Circuit Order, p.29.
[8] 3rd Circuit Order, p.30.
[9] The Appeals Court specifically added that "..a court or arbitrator subsequently adjudicating these issues will need to address whether any individual agreements contains a true assignment and whether there remain enforceable rights under the agreement after any true assignment is voided".
[10] 3rd Circuit Order, p.32.

arbitrated in the appropriate fora"[11].

B. Renewal of Request for Emergency Relief and Demand for Arbitration

Following the Third Circuit's decision, Claimant notified AAA on April 26, 2019, of the Third Circuit's ruling and requested that this Emergency Arbitrator schedule a hearing on Claimant's Application for Emergency Interim Relief, with the indication that an amended filing would be forthcoming.

Claimant submitted its Final Demand for Arbitration and Application for Emergency Interim Relief ("Final Demand") on May 8, 2019, requesting a directive that Respondent escrow $750,000 from his award, once received, in his attorney's trust account pending the arbitrator's final award[12], as well as a declaration that Thrivest's Agreement is valid and enforceable, and finding that Respondent breached his contract with Claimant, together with attorneys' fees and costs. In total, Claimant is requesting this Arbitrator escrow $1,250,000 pending resolution of the arbitration[13]

C. Respondent's Response to Claimant's Renewal of Demand

Respondent issued an Answering Statement and email response dated May 15, 2019, again arguing that AAA does not have jurisdiction over this dispute. In characterizing Thrivest's Agreement with White as a "False Assignment", Respondent notes that §6(z) of the Assignment states that:

> "Within thirty (30) days of [written] notice of a dispute, Buyer and Seller agree to meet at an agreed upon location in Philadelphia, PA to attempt to resolve the dispute in good faith without the necessity of moving forward with binding Arbitration through the American Arbitration Association. Should the dispute not

[11] 3rd Circuit Order, p.34.
[12] The actual binder containing the Final Demand for Arbitration accompanying Claimant's May 8, 2019, cover letter appears to be unchanged from that previously submitted and is in fact dated April 11, 2018.
[13] See Claimant's May 7, 2019, prehearing email @ p.5.

> be resolved between the parties within 60 days of the above-referenced meeting, either party may seek remedies exclusively through a binding arbitration request to the American Arbitration Association and/or one of their representatives".

Respondent argues that Claimants failure to provide written notice and/or meet with him in Philadelphia ("conditions precedent") amounts to a material breach of the Dispute Resolution provisions of the Assignment, and "accordingly the AAA does not have jurisdiction to consider the dispute".

Respondent also argues that Claimant has not demonstrated it is entitled to emergency relief under R-38, stating that Claimant has cited no facts other than mere speculation that over time its prospects for collecting might decrease. Respondent adds that Claimant has offered no proof that Respondent has not made arrangements and/or will not make arrangements to pay under the terms of the Agreement, particularly since Respondent's obligation to pay has only recently been triggered, and that up until the 3rd Circuit's 4/26/19 ruling, Respondent was justified in considering the Agreement null and void.

II. DETERMINATION AS TO ISSUE OF AAA JURISDICTION BY EMERGENCY ARBITRATOR

Section 6(z) of the Agreement between Thrivest and White states that:

> "Within thirty (30) days of [written] notice of a dispute, Buyer and Seller agree to meet at an agreed upon location in Philadelphia, PA to attempt to resolve the dispute in good faith without the necessity of moving forward with binding Arbitration through the American Arbitration Association. Should the dispute not be resolved between the parties within 60 days of the above-referenced meeting, either party may seek remedies exclusively through a binding arbitration request to the American Arbitration Association and/or one of their representatives".

Respondent argues that Claimants failure to provide written notice and/or meet with him in Philadelphia ("conditions precedent") amounts to a material breach of the

Dispute Resolution provisions of the Agreement, and "accordingly the AAA does not have jurisdiction to consider the dispute".

Claimant counters, however, that the reason Thrivest did not demand pre-arbitration mediation was "..in part it was due to timing and in part it was due to the absence of any meaningful opportunity at resolution"[14]. Counsel Buckley notes that on March 19, 2018, Respondent's Counsel, Wood, presented Thrivest with a waiver relinquishing Thrivest's rights under the attempted assignment and guaranteeing return only of its principal. Claimant's Counsel, Buckley, was allowed by this Arbitrator, to testify and in fact did testify, that acceptance of rescission and return of principal only was "communicated to us by Mr. Wood as the only option"[15] for settlement with his client and the deadline for acceptance of this offer was set at April 12, 2018. Mr. Buckley further testified that "...we engaged in some preliminary discussions with Mr. Wood that went nowhere"[16] and subsequently filed for arbitration on April 11, 2018. Mr. Buckley then testified that because the pre-arbitration discussions "have never gone anywhere productive"[17], that mediation in Philadelphia would have been "futile"[18] because there was insufficient time before the April 12, 2018, waiver deadline[19] and that "Mr. Wood communicated that there was really no room to negotiate"[20].

Claimant had also previously advanced this position in its Demand:

> "[a]lthough the Arbitration Clause encourages a pre-arbitration meeting in Philadelphia for the purpose of discussing resolution, such a meeting is not

[14] Tr. p.28, 9-12.
[15] Tr. p.29, 20-23.
[16] Tr. p.29, 11-13.
[17] Tr. p.30, 17-18.
[18] Tr. p.30, 21.
[19] Tr. p. 44, 11-15. Mr. Buckley testified he wanted to commence the arbitration prior to the expiration of the April 12, 2018, waiver ultimatum, and to attempt to prevent dissipation of assets. Tr. p.45, 1-16.
[20] Tr. p.31, 1-3.

> practicable in view of White's health and the impending April 12, 2018, deadline imposed by White for Thrivest to accept rescission of the Agreement. Moreover, White's attorney confirmed that mediation would not be productive considering White's position that he need not comply with his obligations under the Agreement because, he claims, it is null and void[21].

Claimant's Counsel, Buckley, further added that Mr. Wood was also unwilling in June 2018 to escrow the disputed funds in an effort to forego accruing interest[22].

Counsel Buckley also testified that after the 3rd Circuit decision he sent an email to Mr. Wood on May 10, 2019, basically outlining past discussions and confirming that rescission was the only option on the table, and that if there was any room for compromise, Mr. Wood should let Claimant know Mr. Buckley testified that he did not receive a response[23]. Counsel Buckley also added that Respondent had never "requested or indicated an openness to mediation in Philadelphia at any time since we commenced this arbitration"[24].

In response to Mr. Wood's argument that the dispute resolution provision of the Agreement required 30 days written notice followed by a mediation in Philadelphia within 30 days, Counsel Buckley notes that Respondent was denying that any valid, enforceable agreement existed (based on the Court's December 8, 2017, Order), that Mr. White had no obligations with regard to Thrivest, and therefore Claimant proceeded with the filing of the Demand for Arbitration and Application for Emergency Interim Relief[25].

C. Jurisdictional Analysis

[21] Claimant Demand p.5, fn. 2.
[22] Tr. p.33, 21 – p.33, 6.
[23] Tr. p.31, 6 – p.32, 14.
[24] Tr. p.32, 7-14.
[25] Tr. p.39-41.

The Agreement between Claimant Thrivest and Respondent, White specifies that Pennsylvania law controls the arbitration and that that any arbitration would be conducted within the jurisdiction of the Commonwealth of Pennsylvania. However, neither party has submitted any authority to support their position with regard to whether failure of the condition precedent (if found) is grounds to defeat the jurisdiction of AAA under the terms of the arbitration clause contained within the Agreement. Accordingly, as stated by this "Emergency Arbitrator" during the hearing, this decision will be made on the "record and evidence presented and the arguments in this case and in this hearing and anything else I have in the file leading up to this hearing"[26].

1. *AAA Jurisdiction*

AAA Rule 38(d) states in pertinent part that the "emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38". Specifically, AAA Rule R- 7 vests the arbitrator with the "power to rule on his or her own jurisdiction including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim"[27]. In cases where an Agreement containing an arbitration clause is at issue, the arbitration clause "shall be treated as an agreement independent of the other terms of the contract"[28].

This Arbitrator concludes that Claimant has substantially complied with the notice and mediation requirement contained within the Agreement.

First, with regard to the 30 days' notice of a dispute, this Arbitrator notes that the

[26] Tr. p.16, 4-11.
[27] AAA R-7(a).
[28] AAA R-7(b).

original Demand for Arbitration was filed April 11, 2018, and subsequently resurrected in identical form over a year later on May 8, 2019, following the 3rd Circuit's ruling. Mr. Buckley testified that on March 19, 2018, Claimant was presented with an ultimatum by Respondent: either execute a waiver by April 12, 2018, which would return only principal paid ($500,000) and relinquishing all other rights under their Agreement or receive nothing[29]. Mr. Buckley understood that the waiver offer communicated by Mr. Wood was "the only option"[30], and that there would be no other offers. Mr. Buckley also testified to a May 4, 2018; email received from Mr. Wood whereby Mr. Wood stated "Thrivest's election to refuse the rescission offered by the court constitutes a rejection that it must now live with"[31].

Mr. Buckley further testified that "throughout, we have certainly had discussions and been open to a resolution. Those conversations have never gone anywhere productive"[32]. There was certainly no indication of a willingness to compromise and, even though Claimant's Demand for Arbitration had been filed on April 11, 2018, no mention of any failure to provide notice and/or submit to a mediation in Philadelphia at that time was noticed. Mr. Buckley also testified that even as late as May 10, 2019, after the 3rd Circuit's decision and after Mr. Buckley's May 8, 2019 re-submission of the Demand for Arbitration, he sent an email to Mr. Wood "recount[ing] some of the history of the settlement conversations" and that his client, Thrivest saw "no reason to believe that mediation in Philadelphia would be anything other than futile" to which Claimant maintains Mr. Wood never responded[33]. Finally, nothing in the record of this case even

[29] Tr. p.28-29.
[30] Tr. p.29, 22-23.
[31] Tr. p.30, 3-13.
[32] Tr. p.30, 14-18.
[33] Tr. p.31, 6 – p.32, 14.

suggests that Respondent or his Counsel evidenced a willingness to mediate[34] or submit the disputed funds to escrow pending final resolution[35] as Respondent continued to believe that he owed no obligations whatsoever to Thrivest.

Counsel Wood, however, argued that he called Mr. Buckley prior to the hearing to "...see if we can meet and, you know, mediate this thing in Pittsburgh" to which Mr. Buckley replied that he wasn't interested.[36] Mr. Wood indicated that it was his impression that Claimants wanted the "maximum amount, the amount we feel we're due under the contract, plus attorney's fees. Otherwise, there's nothing to talk about".[37]

This "Emergency Arbitrator" finds that it cannot be credibly argued that Respondent was not fully aware of facts surrounding the dispute such that formal "notice" of the dispute needed to be issued, especially in light of the fact that Respondent had up until recently (and perhaps continues to) view the Agreement as a whole null and void. Moreover, Respondent had been queried repeatedly by Claimant as to the status of the receipt of the Settlement funds in an attempt to allay Claimant's fears regarding potential dissipation, giving Respondent clear and unambiguous notice of Claimant's position and concerns. Likewise, I find that Respondent had been fully aware since at least the time of the filing of the Arbitration Demand in April 2018 of Claimant's expressed desire to escrow the disputed funds pending final resolution of this dispute.

Second, with regard to the meeting in Philadelphia, this Arbitrator finds Claimant's explanation for not moving to implement a formal meeting persuasive.

[34] Tr. p.32, 5-14.
[35] Tr. p.33, 2-6.
[36] Tr. p.86, 14 – p.87, 1.
[37] Tr. p.87, 2-6.

Respondent disputed and in fact continues to dispute that a valid, enforceable agreement exists between the parties. This Arbitrator finds the position of Respondent disingenuous to then attempt to defeat the terms of the applicable provision in the Agreement by citing a "precondition" contained within the disputed document and claiming it was not met, when in fact, Respondent has had and continues to have no intention of acknowledging the existence and/or validity of the Agreement in the first place.[38]

Moreover, Respondent has offered nothing that would support a finding that even if "formal" mediation had been attempted/initiated by Claimant, that Respondent would have participated in any meaningful way in light of Respondent's position, and vice versa. *Both* parties argued as to informal overtures made in an attempt to settle which were not acknowledged by the other party as reasonable and/or worthy of further discussion. Such an impasse would certainly indicate that any further attempts at mediating the dispute would be fruitless. Therefore, to use the formal notice and meeting requirements contained within what Respondent considers to be a "False Assignment" with no binding legal effect in an attempt to defeat the Agreement's arbitration mandate, when it is clear Respondent had and continues to have no intention of mediating the dispute, is unpersuasive at best.

2. *Emergency Relief*

AAA Rule 38 permits an emergency arbitrator to award emergency interim relief upon a showing that "...immediate and irreparable loss or damage shall result in the

[38] Mr. Wood, in his closing argument, stated: "Mr. Buckley pointed to provision in the Agreement that he says requires Mr. White to do certain things, well, there's no determination that that's enforceable at all at this point, none.". Tr. p.84, 1-5.

absence of emergency relief, and that such party is entitled to such relief..."[39]. Claimant requests that Respondent escrow $1,250,000 of his award into Mr. Wood's account pending final arbitration of all issues.

The Agreement between the parties mandated that Respondent, within 3 business days of receiving his Settlement Distribution, was to:

> "distribute, or cause to be distributed, all such collections and receipts to Buyer (Thrivest), prior to paying any expenses of Seller or making any other distributions, until Buyer has received the TSF Distribution[40] in full. Until disbursement in accordance with the terms of this Section 2(c), Seller shall hold the Purchased Property and other Distributions in trust for Buyer"[41].

The Agreement also states that the "parties agree that the arbitrator shall have authority to grant injunctive or other forms of equitable relief to either party"[42].

Respondent's Answering Statement purports to incorporate all prior Orders of the District Court and Third Circuit "which denied the Claimant's numerous requests for Emergent relief, and/or expedited consideration"[43]. Yet, the most recent Order from the Third Circuit dated April 26, 2019, does not deny the emergent relief requested by Claimant. In fact, in vacating the District Court's Order enjoining Thrivest from pursuing arbitration and dismissing Thrivest's complaint in *Thrivest v. White* and remanding for further proceedings, the 3rd Circuit stated that:

> "...Thrivest's contract gave it only the right to receive settlement funds after the funds are disbursed to a class member, and the District Court's power of the funds and class ends at that point" .... "[I]t also did not have the authority to preclude Thrivest from litigating any of its remaining rights under the agreement".[44]

[39] AAA R-38(d).
[40] The TSF Distribution amount as specified in the Agreement is $880,194.29.
[41] Agreement §2(c).
[42] Agreement §6(z)(aa).
[43] It would appear that each of the instances where Claimants requested relief was denied it was done so by Judge Brody or by another Judge on the basis that Judge Brody's prior orders invalidated all cash advance agreements, rendering Claimant's requested relief moot.
[44] 3rd Circuit p.33.

The 3rd Circuit also stated that the "litigation funding companies will be able to pursue, outside of the claims administration process, whatever rights they many continue to have under their cash advance agreements with class members", and that "[a]ny questions going to the enforceability of the funding agreements will have to be litigated or arbitrated in the appropriate fora".[45]

Claimant also argues that the emergency relief sought "is consistent with Thrivest's ownership of the disputed funds, which Mr. White sold to Thrivest in exchange for the $500,000 advance more than two years ago"[46]. Claimant supports its argument with caselaw affirming injunctive relief to preserve and protect property pending resolution of a dispute.[47] Respondent has not addressed the caselaw cited by Claimant except to characterize it as "inapposite" in that in each case "the aggrieved party came to the tribunal with known facts that established irreparable harm in the absence of relief"; that "[g]iven the Claimant can only speculate, and does not have known facts to supports its request for emergency relief"; and that the Claimant cannot request expedited discovery to "fish" for information but rather "must come with known facts which justify a need for emergency relief"[48].

Respondent's arguments are not persuasive in view of the evidence to the contrary. Not only was there indication back in May 2018 that Mr. White did not have

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[45] 3rd Circuit p.34.
[46] See Claimant's May 7, 2019 prehearing email to Arbitrator outlining the hearing issues.
[47] See *American Express Travel Related Services Company, Inc. v. Laughlin*, 623 A.2d 854, 856-57 (Pa. Super. Ct. 1993) (affirming injunction enjoining the concealing or dissipation of disputed funds held by fiduciary); and *East Hills TV & Sporting v. Dibert*, 531 A.2d 507, 509 (Pa. Super. Ct. 1987) (holding that seller may be enjoined from using funds in seller's bank so as to prevent potential loss of funds belonging to buyer).
[48] Respondent's May 15, 2019, prehearing email communication to Arbitrator.

the $750,000 requested to be escrowed by Thrivest[49], Respondent has never provided any indication, even after the Demand was re-filed in May 2019, as to when Mr. White received the settlement distribution, how much he received, and most importantly, its present status, despite repeated queries by Claimants. Mr. White chose not to participate in this emergency hearing (despite Claimant's formal request for his attendance) and therefore could not be queried as to the status of the settlement funds and/or his intention to honor his Agreement with Thrivest or even his willingness to negotiate in light of Respondent's "defense" that mediation had not first been attempted.[50] Had Respondent simply provided **any** assurance at any time (but certainly after the 3rd Circuit's ruling) that Claimant's investment would be protected in the event Claimant prevailed, it is unlikely that Claimant would have sought emergency relief, or that this "Emergency Arbitrator" would have granted it if requested under the authority of AAA Rule R-38 and the standard set thereunder. Respondent through his lack of transparency regarding the status of the settlement funds has created the emergent situation in which he now belatedly finds himself.

Moreover, Claimant's concern regarding dissipation of funds by Respondent necessitating an emergency order mandating escrow is not without merit. The Agreement mandated that within three (3) business days of Respondent receiving the Settlement Distribution, Respondent would hold the Distribution in trust for Claimant until such time as Claimant had received the TSF Distribution in full[51]. However, Judge

[49] See 5/2/18 hearing transcript @p.5, 22-25 "...Mr. W. have to put up $750,000 that I can assure you he does not have...".
[50] Mr. Wood stated in closing argument that "Mr. White did, in fact, offer to pay them back the 475 plus a reasonable rate of interest, and Thrivest said it wasn't interested in that. And that was just, and that was just recently". Tr. p.82 12-18. This was neither admitted nor denied by Claimant.
[51] Agreement §2(c)

Brody's interim Orders arguably provided Respondent with justification for refusing to honor the Agreement up until April 2019 when the 3rd Circuit made clear that the Court had no jurisdiction over Respondent or his settlement proceeds once he had received those proceeds.

In fact, there was a representation made during the 3rd Circuit hearing in May 2018, by class counsel, Mr. Seeger, that "Mr. W. would have to put up $750,000, that I can assure you he does not have. He is going to be stuck paying their attorneys' fees"[52]. This statement was made over a year ago and even at that time it appeared that Mr. White had dissipated his settlement to the extent he would not be able to escrow the $750,000 originally requested by Claimant to be set aside pending resolution of this dispute.

In sum, this Arbitrator finds that there is a strong likelihood that the Claimant will prevail on the merits of this case and that Thrivest's Agreement with Respondent will be enforced pursuant to the terms contained therein. Moreover, Claimant has demonstrated a real likelihood that the settlement funds distributed to Mr. White are in danger of being dissipated, if not already dissipated, such that Claimant will be unable, if successful on the merits, to collect the money owed it pursuant to the Agreement.

With regard to including current and prospective legal fees into the escrowed amount, the issue will depend on whether there is a finding of a breach, and if so, when the breach occurred, as it may be the case that a finder-of-fact does not find that some and/or all of the legal fees were reasonable depending if/when the fact-finder determines a breach occurred. Claimant has urged this Emergency Arbitrator to hold

[52] Tr. 59-62 citing Transcript of Telephone Conference Before The Honorable Anita B. Brody, p.5, 23-25.

$1.25 million in trust pending a decision on the merits.[53] Mr. Buckley testified that Claimant has expended nearly $250,000 in legal fees and expenses on this matter, and has offered "lightly redacted" legal bills in support of its request that that amount be considered pursuant to the fee-shifting provision of the Agreement when deciding what if any escrow amount might be appropriate.[54]

Respondent counters by arguing that there must first be a breach before the fee-shifting provision would be triggered. That assertion is obviously legally correct. However, for purposes of this emergency motion Claimant is not asking that the fee-shifting be substantively applied at this time; rather, that the legal fees be factored in when considering the amount to be escrowed, if any. Indeed, should Claimant prevail on the merits, which this Arbitrator believes will be likely, Claimant would be entitled to proven reasonable attorneys' fees and costs pursuant to the fee shifting arrangement contained within the Agreement. Accordingly, Claimants have demonstrated the need for equitable emergency relief to include anticipated attorneys' fees and costs.

Accordingly, this Arbitrator orders Respondent to deposit into Mr. Woods' escrow account the sum of $1,250,000 until such time as the merits of this dispute are decided.

III. OTHER DEFENSE ISSUES

A. Lack of Capacity to Sign Contract

Respondent has pled the affirmative defense[55] that Mr. White lacked the capacity to enter into his Agreement with Thrivest, and for that (and other) reasons, no

[53] Tr. p.81, 4-6
[54] Tr. 56-57.
[55] Respondent's Answering Statement ¶8

Agreement exists. While full discussion on this issue would be premature, suffice to say based on the very limited evidence and even argument presented to this Emergency Arbitrator, Respondent's capacity argument appears to be meritless. Mr. White not only signed the Agreement in the presence of his attorney, but in addition, his own treating neurologist provided a signed (but undated) Statement of Mental Capacity indicating Mr. White was diagnosed with ALS on 10/19/16, and that at no time did Mr. White lack the capacity to make independent legal, medical and financial decisions.

Claimant also points to a TV interview during which Mr. White delivered an "eloquent" speech which, at that time, "certainly demonstrates that he had the capacity to enter into this contract..."[56]. While Respondent's Counsel mentions in closing argument that Mr. White "has a separate diagnosis for a cognitive disability that's completely unrelated to the ALS determination", he offered no further evidence on this point, stating that it is beyond the scope of this emergency hearing.[57] Finally, class counsel gave no indication in either District Court or the 3rd Circuit that Mr. White's capacity to contract was at issue.

Conclusion

The Arbitrator finds that Claimant has sustained its burden of demonstrating ongoing, irreparable harm in the form of dissipation of settlement funds previously distributed to Claimant, and orders Respondent to deposit into escrow the sum of $1,250,000 out of the settlement funds received within two (2) business days as

[56] Tr. 74.
[57] Tr. p.89, 11 – p.90, 2.

specified in the accompanying Order of Arbitrator.

Signed: _____ Date: 06/04/19

Judge Steven I. Platt (Ret.)
AAA Emergency Arbitrator